ONE HUNDRED SEVENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM

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August 29, 2001

The Honorable John Ashcroft
Attorney General
United States Department of Justice
Tenth Street & Constitution Avenue, N.W.
Washington, D.C. 20530

Dear General Ashcroft:

Over the past four years, the Committee on Government Reform has been one of the primary bodies conducting oversight of the Department of Justice. In the course of its oversight, the Committee has uncovered a number of troubling facts about the Justice Department's work. The Committee would not have been able to conduct vigorous oversight had it not obtained or reviewed a number of internal Justice Department documents. Indeed, I have repeatedly called Justice Department officials to public hearings, and the Committee even had to hold Attorney General Reno in contempt in order to vindicate the right of Congress to receive significant records.

The fundamental question now before us is relatively simple: how does Congress conduct oversight of investigations conducted by the Justice Department without access to deliberative material? An inflexible adherence to the position that Congress should never receive such material eviscerates a very important duty required of Congress by the Constitution. I do understand the underlying concerns of the Department of Justice. That is precisely why I attempted to reach an accommodation regarding the Committee's requests for the Conrad memorandum and two declination memoranda. Unfortunately, rather than meet me halfway – as other Administrations have done and as you yourself have demanded in the past – you have elected to follow a course that makes Congress subservient to the Executive branch. This I cannot accept.

I have great confidence in the integrity and ability of you and your staff, and I am optimistic that the Department of Justice will not have the same problems which plagued it

during the tenure of Attorney General Reno.[1] However, my personal confidence in you does not diminish the responsibility of this Committee to conduct vigorous oversight of the Department of Justice. Similarly, it does not lessen the Committee's need to obtain records from the Department.

It is with great concern, therefore, that I address your refusal to produce records requested and subpoenaed by the Committee. On May 22, 2001, the Committee subpoenaed all declination memoranda relating to an investigation of former DEA Special Agent in Charge Ernest Howard.[2] On May 21, 2001, the Committee requested all declination memoranda relating to former Clinton White House aide Mark Middleton. In addition, I have brought to your attention my subpoena for the memoranda by former Campaign Financing Task Force Chief Robert Conrad regarding the decision to appoint a Special Counsel for various campaign fundraising abuses, and all related memoranda, which I originally subpoenaed on August 24, 2000.

In a meeting on July 18, 2001, Assistant Attorney General Michael Chertoff informed me that the Department would not produce any internal, deliberative materials to the Committee, and as a result, would not produce the Conrad memorandum, or the Howard or Middleton declination memoranda to the Committee.[3] His position was cast in absolute, inflexible terms. I know that the decision to withhold these documents was not an easy one for you, and I know that you have made it with the best of intentions. However, the decision to establish an inflexible policy to withhold deliberative materials from Congress is the wrong one, for both legal and prudential reasons. As I indicated earlier, it is unfortunate that we have not been able to reach an accommodation.

The legal right of Congress to review declination memoranda, or other internal deliberative Justice Department materials like the Conrad, Freeh, or La Bella memoranda, cannot be seriously disputed. The Committee spent a great deal of time reviewing applicable legal precedent during its two-year long effort to obtain the Freeh and La Bella memoranda. The relevant cases made it clear that absent a valid claim of executive privilege,[4] Congress has a right to obtain these materials, a right which has been exercised frequently over the years. I have outlined these precedents in detail in both the Committee's August 1998 contempt report[5] as well

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[1] I hold this optimistic view despite public statements from individuals affiliated with the Bush Justice Department transition effort, who indicated that the new Administration would not follow up on investigations relating to the Clinton Administration. After James Riady was sentenced in January 2001, *The New York Times* reported that: "[I]t is unclear what might happen to the investigation of campaign finance abuses after George W. Bush becomes President on Jan. 20. Some advisers to the Bush transition team have said the new administration will let it come to a close." It was highly troubling that anyone associated with the Bush transition would suggest that the Administration should ignore evidence of illegal activity in the interest of "moving on." I would have objected if Al Gore's advisers had made this suggestion, and I object just as strongly when such suggestions are made by the current Administration or its advisors.

[2] While the Committee initially made a letter request for these documents, it was at your staff's suggestion that a subpoena was issued. It is, at a minimum, disturbing that your Department would suggest that Congress issue a subpoena and then deliberately fail to produce the subpoenaed material.

[3] Your staff has provided very helpful briefings on the declinations of the Howard and Middleton cases. However, your staff has refused to provide any access to the declination memoranda themselves.

[4] No claim of Executive Privilege has been made over any of the three categories of records currently being sought by the Committee, nor could such a claim properly be made, given the nature of these records.

[5] Attachment 1.

as in the Committee's December 2000 report regarding the Justice Department.[6] These cases, ranging from the Palmer Raids investigation in the 1920s to the Iran-Contra investigation in the 1980s, establish the right of Congress to receive internal deliberative materials from the Department of Justice. Indeed, you yourself understood this principle when you served in the United States Senate. In August 1998, you appeared on CNN Late Edition, and were asked if you thought that this Committee was right to hold Attorney General Reno in contempt over her refusal to provide the Committee with the Freeh and La Bella memoranda. An exchange between Wolf Blitzer and yourself on national television went as follows:

> Blitzer: You know that in the House of Representatives, Congressman Dan Burton and others are moving with contempt proceedings against Attorney General Janet Reno. For refusing to hand over certain FBI documents, and others involving allegations of Democratic campaign fund-raising abuses during the '96 campaign. Do you want to see this kind of contempt charge against Attorney General Janet Reno?
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> Senator Ashcroft: No, I would like to see her deliver the documents, these are appropriately requested [and] there are only two reasons the House doesn't have a lot of options here in my judgment. [There are] only two reasons why a person can fail to respond to a subpoena from the House. One is that there is no jurisdiction in the committee, this committee clearly has jurisdiction here. Secondly, executive privilege would be asserted. Neither of those items has been raised by the Attorney General. The Attorney General has just learned from the President a technique we call stonewalling, and I don't think the House has much option. I think the House simply has to say, either our subpoenas are respected, or they are challenged on appropriate grounds. And if they are not, stonewalling won't do it, we have to say, contempt is the appropriate citation, it is regrettable, we need the information.

Your position in 1998 was unambiguous and it was correct. Thus, I am at a loss as to why you would take a contradictory position just a few years later.

As you probably also know, recent precedent also clearly confirms Congress' right to receive these materials. During the past six years alone, the Committee has received or reviewed 10 different declination memoranda. While the Committee has usually reached an accommodation with the Department whereby the memoranda are reviewed by Committee staff, rather than physically produced to the Committee, at least one declination memorandum has been produced to the Committee and published in a Committee report.[7] The precedent on other deliberative documents is just as clear. The Committee began its efforts to obtain the Freeh, La Bella, and other related memoranda in December 1997. In August 1998, the Committee held Attorney General Reno in contempt over this precise issue. Finally, in May 2000, the Committee received the memoranda which it had subpoenaed. All of these documents were subsequently made public. The Committee obtained these records from Attorney General Reno, who was

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[6] Attachment 2.

[7] This document was obtained and made public by Chairman Clinger during the 104th Congress.

widely recognized as one of the most recalcitrant Attorneys General in recent memory. You have now staked out a position that is even more restrictive than Attorney General Reno's.

At the same time that you are attempting to erect a restrictive new policy shielding deliberative Justice Department documents from Congressional scrutiny, you have already departed from that policy by providing deliberative Justice Department documents to the Senate Judiciary Committee. Indeed, you appear to have done so after the head of the Criminal Division provided me with a clear statement of the Justice Department's new policy. In July 2001, you provided staff of the Senate Judiciary Committee with access to records relating to Justice Department investigations of allegations relating to improper actions by FBI officials in the Ruby Ridge and Waco matters. Included in the materials which you provided to the Senate Judiciary Committee are internal, deliberative memoranda discussing investigations of Justice Department personnel. These memoranda are indistinguishable from the materials you are withholding from this Committee.[8] Obviously, I am concerned that you have embarked upon a course that sets different standards for different Congressional committees.

The practical concerns you have outlined regarding the Committee's access to deliberative documents like the Conrad memorandum or declination memoranda are serious, but they do not outweigh the need of the Committee to review this information. Again, this is why I have attempted to reach an accommodation. The only concern that you or your staff have articulated as a reason to withhold these records from Congress is that the production of the records will have a chilling effect on the ability of Department personnel to share their opinion with their superiors. When this argument was first made by Attorney General Reno, in response to the Committee's subpoenas for the Freeh and La Bella memoranda, the Committee examined it, and rejected it. The Department has never produced any evidence that Congressional review of deliberative documents has a chilling effect on Department personnel. Rather, there is every indication that Justice Department personnel have continued to offer their candid advice in written memoranda despite decades of Congressional oversight. This has certainly been the Committee's experience with documents relating to the campaign fundraising investigation. For example, despite the fact that the Committee subpoenaed the Freeh memorandum, several months later Charles La Bella drafted his lengthy memorandum regarding the appointment of an independent counsel. Then, despite the fact that the Committee subpoenaed the La Bella memorandum, and held the Attorney General in contempt over her refusal to provide it to the Committee, a number of Justice Department personnel wrote lengthy, candid memoranda expressing their advice regarding the appointment of an independent counsel.[9] Even after the

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[8] Some Justice Department staff claim that the internal deliberative memoranda relating to the Ruby Ridge and Waco matters can be made available to Congress because they relate to investigations by the Office of Professional Responsibility, not the Criminal Division. Such a distinction is meaningless. As some of the memoranda relating to Ruby Ridge and Waco make clear, FBI personnel were being investigated for serious matters, including altering 302s and intimidating potential witnesses. These actions could have resulted in criminal prosecution. Therefore, these memoranda regarding Ruby Ridge and Waco contain detailed deliberations regarding investigations that could result in criminal prosecution. As such, they are virtually identical to the Freeh, La Bella, and Conrad memoranda.

[9] In perhaps the best example of the hollowness of the Department's claims of a "chilling effect," on the same day that the Attorney General was held in contempt over her refusal to provide the Committee with the Freeh and La Bella memoranda, Lee Radek drafted a memorandum in which he clearly contemplated the public release of those memoranda, stating "[i]t is inexcusable, and I believe clearly calculated, that they [La Bella and De Sarno] have

Freeh, La Bella, and a number of other memoranda were provided to the Committee, and released publicly, Justice Department personnel like Campaign Fundraising Task Force Chief Robert Conrad have continued to offer their candid advice in memoranda. As the Committee found in its report regarding the Reno Justice Department:

> Indeed, the only practical consequence of the committee's release of the Freeh and La Bella memoranda is probably the message that one should not commit dishonest views to paper. The committee does not feel the need to protect malign advice.[10]

In addition, I believe that you should weigh against your concerns about Congressional access to these documents the substantial benefits that arise from Congressional oversight of the prosecutorial function. There are a number of troubling facts about the Justice Department that Congress would have never learned if it had not forced the Department to turn over the kinds of deliberative materials you are now trying to withhold:

- The public would never have learned that Charles La Bella, the lead prosecutor investigating the 1996 campaign fundraising scandal, believed that the Department created a double standard for investigating President Clinton: "[i]f these allegations involved anyone other than the President, Vice President, senior White House, or DNC and Clinton/Gore '96 officials, an appropriate investigation would have commenced months ago without hesitation." La Bella also concluded that "the contortions the Department has gone through to avoid investigating these allegations are apparent. . . . It is time to approach these issues head on, rather than beginning with a desired result and reasoning backwards."

- La Bella also wrote that "one could argue that the Department's treatment of the Common Cause allegations has been marked by gamesmanship rather than an even-handed analysis of the issues. That is to say, since a decision to investigate would inevitably lead to a triggering of the [Independent Counsel Act], those who are hostile to the triggering of the Act had to find a theory upon which we could avoid conducting an investigation." This is of particular consequence when put in the context of a Justice Department that was prepared to allow a senior official to denigrate the Independent Counsel Act in a widely circulated newspaper.[11]

- Steve Clark, another Justice Department attorney investigating the campaign fundraising matter wrote: "that, to date, we have been unable to investigate the Common Cause allegations in a straightforward way has been a great personal and professional disappointment. But, I believe the public has been most dis-served [sic] by the way in which the 'whether to investigate' issue has been approached, debated, and resolved. Never did I

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chosen to communicate their views about others within the Department in a memorandum that is the subject of such intense public interest, and is therefore likely to be leaked or become public through some other route."

[10] Janet Reno's Stewardship of the Justice Department: A Failure to Serve the Ends of Justice, 139, H. Rep. 106-1027 (2000). It was particularly important to learn from one of the memoranda that one senior Justice Department official made misrepresentations so severe that the then-Assistant Attorney General for the Office of Legal Counsel was compelled to write a memorandum which pointed out the misrepresentations. It is difficult for the Committee to understand why such communications should be cloaked in secrecy.

[11] *See* Jeffrey Goldberg, "The Mystery of Janet Reno; What is Janet Reno Thinking?" *The New York Times* (July 6, 1997).

dream that the Task Force's effort to air this issue would be met with so much behind-the-scenes maneuvering, personal animosity, distortions of fact, and contortions of law. . . . All this, not to forestall an ill-conceived indictment, not to foreclose a report making an independent counsel referral, but to prevent any investigation of a matter involving a potential loss of more than $180 million to the federal treasury."

- The Committee learned that each of the top investigators charged with investigating the 1996 campaign fundraising matter – Charles La Bella, his deputy Judy Feigin, Task Force Chief David Vicinanzo, FBI Director Louis Freeh, FBI General Counsel Larry Parkinson, Associate Deputy Attorney General Robert Litt, and even Public Integrity Section Chief Lee Radek – all recommended the appointment of an independent counsel at least once during the three-year debate within the Justice Department. Yet, the Attorney General ignored all of their advice and insisted on investigating the President and her own political party herself, with disastrous consequences.

You have publicly acknowledged that you are trying to restore public trust in the Justice Department and the Federal Bureau of Investigation. It is hard to believe that public confidence in our investigators and prosecutors can be restored by an inflexible policy that prevents Congress from discharging a constitutionally-mandated duty. Rather, Congress has a right to review and evaluate certain prosecutorial decisions, especially those that go to the core of public confidence in the integrity of the Justice Department. For example, this Committee is currently conducting an investigation of the Department's handling of informants in its organized crime investigations. The Committee recently heard testimony from Joseph Salvati, who was imprisoned for 30 years for a crime he did not commit. While Mr. Salvati sat in prison, the FBI had substantial information pointing to his innocence, yet the FBI continued to take steps to assist and protect the man whose testimony put Salvati in prison. The Committee's investigation of the Salvati matter, and a number of other equally disturbing matters, will require access to internal deliberative Department memoranda much like the Conrad memorandum. I fear that the policy you are so intent on establishing will act to prevent the Committee from learning the full truth about these matters. What the Committee has learned so far in its investigation shows that mistakes like the Salvati case are the result of a lack of accountability in the Department's decisionmaking. I fail to see how your new policy – which will cloak the Department's decisionmaking in even more secrecy – will improve the operation of the Department.

To summarize, the Committee asks only to receive the records it has received in the past. Specifically, the Committee has requested two declination memoranda relating to Ernest Howard and Mark Middleton, the Conrad memorandum regarding the need for a special counsel to investigate campaign fundraising abuses, and other related memoranda. There is no valid legal or practical reason why these records should be withheld from the Committee.

Attorney General Ashcroft, just three years ago, you agreed with my position, and you demanded that Attorney General Reno turn over the Freeh and La Bella memoranda. You said "I would like to see her [Attorney General Reno] deliver the documents . . . we need the information." I believe that your analysis of Attorney General Reno's actions was exactly right, and I am concerned that you have one standard for a Democrat Attorney General and another standard for yourself. This appears to be inexplicable. Therefore, I respectfully request that you

reconsider your position, and produce to the Committee the documents which I have requested. If you do not produce the requested records, I will have no choice but to ask you to appear before the Committee to explain your position publicly.

Sincerely,

Dan Burton
Chairman

cc: Members, Committee on Government Reform